SUPREME COURT, U. S.

MAY 24 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1578

AUDREY S. HARTEL, individually and as Administratrix of the Estate of JOHN HARTEL, Deceased,

Petitioner,

—against—

THE LONG ISLAND RAIL ROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARNOLD B. ELKIND
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IN THE

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AUDREY S. HARTEL, individually and as Administratrix of the Estate of JOHN HARTEL, Deceased,

Petitioner,

—against—

THE LONG ISLAND RAIL ROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit, affirming a judgment entered in favor of the Respondent pursuant to the order of the Honorable Richard Levet at the end of Petitioner's evidence during a trial before a jury in the Southern District of New York.

Opinions Below

Judge Levet's Memorandum Decision (A. 12)* granting Respondent's motion to direct a verdict for the Respondent is not reported (R. 185).** The case was argued in the

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* A. references are to appendix to this petition.

** R. references are to Record below as shown in the printed appendix prepared for the Court of Appeals.

Court of Appeals before Judges Moore, Mulligan and Hays. The prevailing opinion was written by Judge Moore (A. 4). The dissenting opinion was written by Judge Hays (A. 9). The opinions are not yet officially reported.

The Court of Appeals denied rehearing (A. 1) and rehearing en banc (A. 2) by orders dated May 3, 1973, three judges dissenting.

Jurisdiction

Jurisdiction in the action below was under the Federal Employers' Liability Act (45 U.S.C. §51 et seq.), the claim being that of a widow to recover damages for the wrongful death of her railroad employee husband.

The judgment and order of the Court of Appeals was entered on March 28, 1973, and affirmed the dismissal of the claim. This Court has jurisdiction to review the judgment by granting a writ of certiorari pursuant to the provisions of 28 U.S.C. §1254(1).

Questions Presented for Review

1. Whether Trial Judges may now deprive a railroad worker of the benefit of a trial by jury promised by this Court's historical stewardship of the Federal Employers' Liability Act and guaranteed by the 7th Amendment of the Constitution of the United States?

2. Whether an injured or deceased railroad worker must now prove not only general foreseeability but also precise notice of the specific hazard which brought about his damage in order to obtain the benefits of coverage by the Federal Employers' Liability Act?

3. Whether railroads should be required to exercise reasonable care to afford their employees protection from tortious misconduct by third persons which can be generally anticipated but on which specific detailed advance information may be lacking?

Statutes Involved

The pertinent sections of the Federal Employers' Liability Act (45 U.S.C. §51 et seq.) are as follows:

"§51. Every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment * * *."

"§54. Assumption of Risks of Employment. In any action brought against any common carrier under or by virtue of any of the provisions of this Act [§§51-60 of this title] to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; * * *"

"§56. * * * Under this Act an action may be brought in a circuit [district] court of the United States, * * *."

Amendment 7 to the Constitution of the United States reads in pertinent part:

> "Trial by Jury in Civil Case.—In suits at common law where the value in controversy shall exceed $20., the right of trial by jury shall be preserved, * * *."

Statement of the Case

John Hartel, a ticket agent employee, was required by the Respondent to open a ticket office at the Mineola Railroad Station of the Respondent between 6:30 and 7:00 o'clock in the morning on a Sunday. The station was located at Mineola, Long Island, and there was a degree of remoteness to the facilities at that time (Exhibit 3, R. 155). The physical arrangement of the ticket office included a steel shutter extending from the top of the counter to the ceiling (Exhibits 4 and 5, R. 157, R. 158). In order for the agent to open the shutter to sell tickets to the public he was required to leave the security of the ticket office and enter a passenger waiting room. There was a solid door leading from his office to the waiting room which had no peephole, and until the shutter was lifted the agent could not see into the waiting room from the office (R. 63). Hartel was shot and killed by the holdup men in the waiting room while attempting to open the steel shutter.

As in "Catch 22", the Courts below have held that Mrs. Hartel could only recover for the loss of her husband if there was evidence presented which would serve as a basis for a finding that the holdup was foreseeable at that time and place. At the same time, having made foreseeability the pivot on which liability turns, the Court has strictly excluded any evidence which would tend to

establish a basis for foreseeability by the Respondent, including evidence of prior holdups of station agents in the vicinity, assaults upon the agents, evidence of complaints by the decedent's collective bargaining representative regarding the unsafe arrangement for ticket agents at stations, including the Mineola Station, and evidence of an expression of fear by the decedent prior to his death communicated to an attorney in the Claims Department of Respondent regarding the unsafe condition at the Mineola Station.

Reasons for Granting Writ

The Federal Employers' Liability Act is an instrumentality chosen by the Government of the United States to stimulate concern by the railroad industry to reduce or eliminate unnecessary hazards. It provides the chosen arrangement for compensating those who sustain damage to life and limb in order to maintain and operate our nation's transportation by rail. Some degree of stewardship by the Supreme Court is occasionally necessary to prevent the erosion of the remedy by the introduction of prima facie requirements inappropriate to the dual humanitarian purposes of a fault-oriented compensation system.

The railroading hazard in the case below was the unnecessary exposure to holdup imposed upon a ticket agent by the railroad. An even more common current risk governed by the same principles as the case below, is the hazard of injury from stoning of operating trains and train men by vandals and other third parties.

In the case below it is Petitioner's contention that the duty to exercise reasonable care to furnish the ticket agent with a safe place to work (*Bailey* v. *Central Vermont Ry.*,

319 U.S. 350, 353) included revising the arrangement so that the ticket office could be opened from the security of the office rather than from the waiting room, or, alternatively, the drilling of a peephole in the door which would have allowed perception by the ticket agent of the risk of entering the waiting room in "off hours."

The corresponding duty toward operating employees to protect them from stoning would be the installation of metal screens in cabooses and unbreakable glass in locomotives. If the Supreme Court declines to review the decision of the prestigious Court of Appeals for the Second Circuit in this case it will be widely interpreted as a signal that the railroad industry need no longer be concerned with taking any measures to protect their employees from third party assaults by either stones or holdups. The hazards of holdups and stonings should not be assumed by employees if a reasonable degree of care would accomplish mitigation of the risk. (45 U.S.C. 54)

The expenditure by the railroad of a few dollars to install a peephole in a door to protect a ticket agent is a far cry from the military tanks postulated by Mr. Justice Whittaker as a protective measure for crossing flagmen in *Inman* v. *B. & O.R.R. Co.*, 361 U.S. 138, 142.

Questions concerning causation must remain the special preserve of the jury in order to continue the successful balance finally achieved by *Rogers* v. *Missouri Pacific*, 352 U.S. 500, and *Gallick* v. *B. & O. R. Co.*, 372 U.S. 108. That balance accomplishes an effective statute with a minimum appellate caseload. If a writ is not granted in the instant case it is predictable that there will be a return to the judicial interference with fact-finding and the torrent of petitions for writs of certiorari which marked the pre-Gallick and Rogers era.

Mr. Justice White, writing the prevailing opinion of this Court in *Gallick*, commented critically on an instruction of the *Gallick* trial court. He wrote (p. 121):

> "* * * in deciding whether respondent had reason to anticipate and foresee any harm to petitioner, the trial court instructed the jury to take into account 'the past experience respecting the location and conditions in question' and the fact 'that no occurrence of the kind here alleged either occurred, or was known by defendant to have occurred, at or near this place before August of 1954.' The jury thus might have determined that, since there had been no similar incidents at this pool in the past, the respondent had no specific 'reason' for anticipating a mishap or injury to petitioner—*a far too narrow a concept of foreseeable harm to negative negligence under the Federal Employers' Liability Act.*" (Emphasis supplied)

In the case below the Trial Judge used the concept which Mr. Justice White labeled as far too narrow, both as a basis for excluding relevant evidence and finally as a basis for depriving the Petitioner of her constitutionally guaranteed right to a jury trial.

In *Lillie* v. *Thompson*, 332 U.S. 459, this Court decided that there was a duty to afford railroad employees protection from third party assaults when the evidence provided a basis for anticipation. Environmental circumstances rather than specific notice was adequate to present the jury question according to *Lillie*.

Petitioner expresses the fear that courts are interpreting the reluctance of this Court to review decisions in F.E.L.A. cases as a signal to strip from the Railroad Worker much of the protection from judicial subversion of the jury's function — protection developed through the decades of effort in and by this court between 1939 and 1969.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARNOLD B. ELKIND
Attorney for Petitioner

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals For the Second Circuit Denying Motion for Rehearing in banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 3rd day of May, one thousand nine hundred and seventy-three.

Docket No. 72-1452

AUDREY S. HARTEL, individually and as Administratrix of the Estate of JOHN HARTEL, deceased,

Plaintiff-Appellant,

v.

THE LONG ISLAND RAILROAD COMPANY,

Defendant-Appellee.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judge Hays, Oakes and Timbers dissent.

/s/ HENRY J. FRIENDLY
Henry J. Friendly
Chief Judge

Opinion of the United States Court of Appeals For the Second Circuit Denying Motion for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the third day of May one thousand nine hundred and seventy-three.

Docket No. 72-1452

Present:

HON. LEONARD P. MOORE
HON. PAUL R. HAYS
HON. WILLIAM M. MULLIGAN,
Circuit Judges.

AUDREY S. HARTEL, individually and as Administratrix of the Estate of JOHN HARTEL, deceased,

Plaintiff-Appellant,

v.

THE LONG ISLAND RAILROAD COMPANY,

Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

Opinion of the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 104—September Term, 1972.

(Argued October 25, 1972 Decided March 28, 1973.)

Docket No. 72-1452

AUDREY S. HARTEL,

Plaintiff-Appellant,

v.

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellee.

Before:

MOORE, HAYS and MULLIGAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard H. Levet, *Judge,* dismissing the complaint in an action brought under the Federal Employers' Liability Act (45 U.S.C. §51 *et seq.*) to recover damages for the wrongful death of plaintiff-appellant's husband, killed during a robbery of one of defendant's railroad stations.

Affirmed.

ARNOLD B. ELKIND, New York, N. Y., *for Plaintiff-Appellant.*

Opinion of the United States Court of Appeals For the Second Circuit

GEORGE M. ONKEN, Jamaica, N. Y. (Jay E. Gerber and Paul C. Sanders, New York, N. Y., of counsel), *for Defendant-Appellee.*

MOORE, *Circuit Judge:*

Some time between 6:30 and 7:00 A.M. on Sunday, February 18, 1968, John Hartel, a ticket agent for the Long Island Rail Road Company (LIRR) arrived at the Mineola, Long Island, railroad station to open the ticket office. He entered the waiting room to open the steel shutter covering the ticket window. While so doing, one of three men with a gun stepped up behind him and announced a hold-up. When Hartel attempted to flee, he was shot in the back and killed.[1]

Plaintiff-appellant in this action, Hartel's widow, sought to recover damages from her husband's employer in her own right and as administratrix of her husband's estate under the Federal Employers' Liability Act (FELA) 45 U.S.C. §51 *et seq.* The trial court found that plaintiff had "introduced no evidence showing that defendant should have reasonably foreseen the possibility of a holdup at the Mineola Station."[2] and granted defendant's motion for a directed verdict. From the judgment dismissing the complaint, plaintiff appeals. In addition to charging error in directing a verdict in favor of the defendant, plaintiff asserts that four proffered items of evidence were improperly excluded.

An essential ingredient in plaintiff's case was that she establish that the LIRR should have foreseen that a crim-

1 *Hartel* v. *The Long Island Rail Road Co.*, 68 Civ. No. 2187 (S.D.N.Y., Filed Mar. 6, 1972).

2 *Id.*

inal attack (robbery and murder) might be made upon its ticket agent at the Mineola station.

In reviewing this directed verdict this Court must view the evidence and all inferences therefrom in the light most favorable to the plaintiff. *O'Connor* v. *Pennsylvania R.R.*, 308 F.2d 911 (2d Cir. 1962). We have done this, and affirm the decision of the court below.

The FELA provides:

> Every common carrier by railroad * * * shall be liable in damages to any person * * * or, in case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *. 45 U.S.C. § 51.

To establish her case plaintiff had to show that the danger to her husband from armed criminals was, or should have been, foreseen by the defendant. Once this was shown, a further showing that defendant was negligent in whole or in part in failing to minimize this danger would have been required.

In attempting to demonstrate the foreseeability of the criminal assault which caused her husband's death, plaintiff offered to prove that in the preceding four years there had been ten robberies or attempted robberies at defendant's stations located between 4.7 and 29.8 miles from the Mineola station.[3] Two of these had occurred in the month immediately preceding the Mineola holdup. Judge

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3 There had been one robbery in 1964, four in 1966, three in 1967, and two in January, 1968, just prior to the crime in question here. During two of these completed or attempted crimes, the ticket agent had been assaulted.

Levet refused to permit this proof. Plaintiff here argues that evidence of prior holdups should have been admitted to show that the LIRR did have knowledge of the dangers ticket agents faced. In each of the cases cited by plaintiff to support this position, however, the courts have specifically limited evidence of prior incidents to those occurring at the exact locus of the incident giving rise to the litigation. In addition, they have required that the circumstances under which such incidents occurred must have been substantially the same as those in the action brought. Thus, in *Cahill* v. *New York, N.H. & H.R.R.*, 236 F.2d 410, 411 (2d Cir. 1956), the case most heavily relied upon by plaintiff, a listing of the collisions which had occurred at a particular intersection was admitted to show the railroad's knowledge of the danger of such incidents at that place. In the instant case no prior robbery had occurred at the Mineola station. Therefore, Judge Levet was correct in excluding the evidence of prior robberies. *See also Plough* v. *Baltimore & O. R.R.*, 164 F.2d 254, 256 (2d Cir. 1947).

Plaintiff also sought to introduce testimony concerning a conversation between herself and a staff attorney of the LIRR named Donnelly. Just before Hartel's funeral Donnelly, who had been Hartel's friend, told plaintiff that her husband had once mentioned to him that he was afraid of working at the Mineola station. Direct testimony by Donnelly was not offered. In addition, it was not shown that Donnelly was authorized to receive notice of dangerous working conditions or that, by this conversation, Hartel had intended to give the LIRR such notice. Under these circumstances it was not error for Judge Levet to exclude such hearsay testimony. *Schilling* v. *Delaware & H. R.R.*, 114 F.2d 69, 71 (2d Cir. 1940).

By attempting to introduce correspondence and testimony as to conversations between the ticket agents' union and the LIRR, which related to requests for increased protection for ticket clerks from the dangers of armed robbery, plaintiff sought to demonstrate defendant's awareness of the risks its employees faced. When it was determined that neither this correspondence nor the union leader's conversations with railroad management made specific reference to the Mineola station, this evidence was excluded.

Plaintiff made no offer of evidence which would have shown that there was any unusual danger at the Mineola station. To be admissible to show the foreseeability of a criminal assault upon an employee for which an employer could be held liable under the FELA, we think that the evidence must be such that it did in fact call, or should have called, to the employer's attention the special dangers found at a particular location.

In this regard the case of *Inman* v. *Baltimore & O. R.R.*, 361 U.S. 138 (1959) is instructive. There an intoxicated motorist was violating five traffic statutes when he ran down a train flagman. The Supreme Court affirmed the decision of the Ohio Court of Appeals reversing a jury verdict for plaintiff. In his concurring opinion Justice Whittaker emphasized the complete failure of the evidence to show that the negligence of the railroad had contributed in any way to the flagman's injury.

> Reduced to substance, the simple facts are that petitioner, a crossing flagman, while standing in a well-lighted intersection alongside a passing train in the nighttime and swinging a lighted red lantern in each hand, was struck, knocked down and run over by a

> drunken driver. What, I ask, did respondent do or omit that caused or contributed to cause that casualty? How could it have prevented the casualty? Petitioner says that respondent failed to provide him with "enough protection". About the only way, as I perceive, that respondent could protect its crossing flagmen against injury from such lawless conduct by third persons would be to provide them with military tanks and make sure they stay in them while within or moving about crossing-intersections in the performance of their duties—and I am not even sure that this method, though ironclad, would be certain protection to a flagman against lawless injury by third persons, for someone might shoot him, an act not very different, it seems to me, from the drunken driver's conduct which injured petitioner in this case, and for which injuries he insists, and four members of this Court agree, a jury should be permitted to require respondent to pay damages. How this can be thought to square with any known concept of "negligence" is beyond me.
> 361 U.S. at 142

Plaintiff's final point is that a confession of one of the perpetrators of the felony murder of Hartel should have been admitted into evidence to show the circumstances under which the robbery occurred. In this case it was not error to refuse to admit any evidence detailing the circumstances of the robbery when the foreseeability of the crime was not established.[4]

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4 Several questions concerning the admissibility of this confession were briefed by the parties. The confession, rather than direct testimony,

Dissenting Opinion of the United States Court of Appeals For the Second Circuit

Although absent foreseeability, plaintiff's case was deficient as a matter of law, the Trial Court also said: "[O]n judicial appraisal, I find that negligence on the part of the defendant railroad could have played no part in the death of plaintiff's intestate." [5] We agree. Even if the LIRR had installed, as plaintiff now suggests, either a steel shutter opening from the inside or a peep-hole which might have enabled the agent to observe persons in the waiting room, these measures would not have protected him from assault and murder.

The judgment below, dismissing the complaint, is affirmed.

HAYS, *Circuit Judge*, dissenting:

I dissent.

There was enough evidence to present a jury question on whether the railroad exercised due care to make the employee's place of employment reasonably safe. As the Supreme Court has pointed out, Congress expressed a strong preference for jury determination of actions arising under the FELA. See, *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). This is especially true when the issue involved is the negligence of the railroad.

"The Congress when adopting the law [FELA] was particularly concerned that the issues whether there

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was offered because the perpetrator, serving a lengthy sentence for this crime, had refused to discuss it without first talking to a lawyer. Since no evidence concerning how the crime was committed could have been admitted until it was shown to have been foreseeable, we express no view on the other possible grounds for excluding this confession.

[5] *See* note 1, *supra*.

> was employer fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair minded men could reach those conclusions on the evidence." 352 U.S. at 508.

In the instant case, when the evidence is viewed, as we must view it, in the light most favorable to the appellant, it is clear that a jury could properly find that the employer's failure to install a peephole in a situation where the danger was great and the corrective action required only a small effort, was negligence and that this negligence played some part in the employee's death.

The trial court also erred in excluding evidence which tended to establish the defendant's knowledge of the hazards to which the ticket agent was exposed. The testimony of the union official concerning his conversations with railroad officials tended to establish that the defendant was aware that the steel doors with no peephole presented a safety problem.

> "I requested that the steel doors be removed from this station [Mineola], as well as other stations, and also that a peephole be put in there and a silent alarm to protect the employees, including protection when they open these offices at six and six thirty in the morning."

The exclusion of evidence of prior holdups at defendant's ticket offices was also error. In FELA cases, where foreseeability has been an issue as in the instant case, proof of prior accidents has been held admissible. See, *Cahill* v. *New York, New Haven & Hartford R. Co.*, 236 F.2d 410

(2d Cir. 1956); *Plough* v. *Baltimore & Ohio R.R. Co.*, 164 F.2d 254 (2d Cir.), cert. denied, 333 U.S. 861 (1947). The majority holds that these cases do not require admission of the evidence of prior holdups in the instant case, because the holdups did not occur "at the exact locus of the incident giving rise to the litigation." I do not read these cases so narrowly. I would allow the evidence to be admitted since it tended to establish defendant's knowledge of the hazards to which the ticket agent was exposed.

Memorandum on Motion to Direct Verdict

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civil 2187

AUDREY S. HARTEL, individually and as Administratrix of the Estate of JOHN HARTEL, Deceased,

Plaintiff,

—against—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant.

LEVET, *D.J.*

Plaintiff, Audrey S. Hartel, brings this suit individually and as Administratrix of the Estate of John Hartel under the Federal Employers' Liability Act, 35 Stat. 65, 45 USC 51. The essence of her claim is that John Hartel was killed by a hold-up man as a result of defendant's negligence in sending her husband to work in a place defendant knew to be unsafe without taking reasonable measures to protect him.

This court grants defendant's motion for a directed verdict.

Plaintiff's allegations may be summarized as follows: The deceased, John Hartel, was a ticket agent employed by defendant and assigned to the Mineola Station (Mineola, New York), where he was in charge of the ticket office. On February 18, 1968 he was shot to death during the com-

On Sunday morning, February 18, 1968, at approximately 6:25 A.M. John Hartel was a passenger in a westbound mission of a holdup.

train due to arrive at the Mineola Station at 6:30 A.M. At approximately the same time three men sat in the waiting room of the Mineola Station among the passengers awaiting the train's arrival. When the train carrying John Hartel arrived at the station, all of the passengers with the exception of the three men, left the waiting room and boarded the train. These three men remained. John Hartel went to the rear of the station office and the ticket office. When John Hartel returned to the waiting room in order to raise the metal shutter which enclosed the glass petition which separated ticket purchasers from the ticket agent, one of the three men stepped up behind Hartel, with a gun, and announced a holdup. When Hartel reacted by going towards the exit door he was shot in the back. Subsequently he died of his wounds.

In Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957), the Supreme Court laid down the rule that "judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." Id. at 506-507.

In measuring plaintiff's proof, when she rested, by the *Rogers* yardstick I reach the conclusion that plaintiff had not presented sufficient proof so that the jury could, with reason, draw the conclusion that the negligence of the Long Island Railroad played any part at all in the death of plaintiff's intestate.

The Federal Employers' Liability Act does not make the employer an insurer. Here plaintiff's intestate had been working at the Mineola Station for many years, performing these same duties under like circumstances. No holdups or assaults occurred during that long period. It is true that

under certain unusual circumstances, where the act in question was the result of criminal conduct, a lawsuit for negligence may lie. See, Lillie v. Thompson, 332 U.S. 459 (1947). However, the key element is notice to the defendant. The defendant is liable where it knew or reasonably should have foreseen that a crime would possibly occur. Lillie v. Thompson, supra; Inman v. Baltimore & Ohio R. Co., 361 U.S. 138 (1959). Plaintiff has introduced no evidence showing that defendant should have reasonably foreseen the possibility of a holdup at the Mineola Station. In light of this background, the evidence is so thin that, on judicial appraisal, I find that negligence on the part of defendant-railroad could have played no part in the death of plaintiff's intestate.

Accordingly, defendant's motion for a directed verdict is granted. The court has previously directed judgment for defendant.

Dated: New York, N.Y.
March 6, 1972

RICHARD H. LEVET
United States District Judge

SUPREME COURT, U. S.

FILED

JUN 21 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1578

AUDREY S. HARTEL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN HARTEL, DECEASED,
Petitioner,

—against—

THE LONG ISLAND RAIL ROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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June 21, 1973.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1578

AUDREY S. HARTEL, individually and as Administratix of of the Estate of JOHN HARTEL, Deceased,

Petitioner,

—against—

THE LONG ISLAND RAIL ROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

This action was brought by petitioner, on her own behalf and as administratrix of her deceased husband's estate, for damages under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.* The first trial of this action resulted in a mistrial. At the retrial, respondent's motion for a directed verdict was granted at the close of petitioner's case, and the United States District Court for the Southern District of New York entered judgment dismissing the complaint. The United States Court of Appeals for the Second Circuit affirmed, one judge dissenting, and thereafter denied a petition for rehearing containing a suggestion for rehearing en banc, three judges dissenting.

COUNTERSTATEMENT OF QUESTION PRESENTED

The court of appeals held that there was not sufficient admissible evidence of foreseeability, negligence and causation in the record to present a jury question. The propriety of that decision is the only question presented here. This case does not present the question whether, notwithstanding petitioner's failure to establish the elements of a cause of action under the Federal Employers' Liability Act, she was denied her right to trial by jury. Nor does it present the question whether the requirements of proof and the standard of care in a negligence case have been or ought to be modified.

COUNTERSTATEMENT OF THE CASE

Petitioner's husband, John Hartel, a ticket agent employed by respondent, was shot and killed during the course of a robbery by three assailants at the Mineola, New York, passenger station on February 18, 1968. On that morning, a station porter on duty with Mr. Hartel was in the men's room when he heard "a fuss" in the waiting room downstairs. (R. 57.)* He looked out the window and saw Mr. Hartel walking toward a nearby hospital. (R. 61.) When the local police arrived to investigate, they found Mr. Hartel lying in the street, apparently dead. (R. 42.) A steel shutter over the ticket office window, ordinarily opened from the waiting room, was found to have been raised to about two-thirds of its length. (R. 46.) There was no other evidence as to the circumstances of the robbery or of Mr. Hartel's death.

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*References cited to "R." are to the record below; references cited to "Pet. App." are to the opinions of the district court (Pet. App. 12a-14a) and the court of appeals (Pet. App. 2a-11a) which are printed in Petitioner's Appendix.

There had not been any prior crimes at the Mineola station (Pet. App. 13a), and there was no evidence of any unusual dangers or unsafe conditions at that station. (Pet. App. 7a.)

ARGUMENT

The decision below is clearly correct. It is not in conflict with the decisions of any other court of appeals or of this Court. No special or important reason exists for granting a writ of certiorari, and no further review is warranted.

1. There is absolutely no evidence in the record that the crime which resulted in Mr. Hartel's death was foreseeable, or that if foreseeable, his death resulted in any respect from respondent's negligence. Petitioner's failure to establish any of the elements of a cause of action under the Federal Employers' Liability Act required a directed verdict in respondent's favor.*

The Federal Employers' Liability Act is not a workmen's compensation statute. Liability under the Act is based upon negligence, and unless petitioner can prove that respondent was at fault, she cannot recover. If she fails to adduce any evidence from which a jury might make such a finding, her complaint must be dismissed as a matter of law. *See, e.g., New York, N. H. & H. R. R.* v. *Henagen,* 364 U. S. 441 (1960); *Inman* v. *Baltimore & O. R. R.,* 361 U. S. 138 (1959); *Herdman* v. *Pennsylvania R. R.,* 352 U. S. 518 (1957).

Reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence.

*Petitioner's claim that she was deprived of her right to a trial by jury by virtue of a directed verdict (Pet. 2, 7) is wholly without support. Nothing in the Constitution, the Act or in the decisions of this Court prevents a trial court from directing a verdict if the essential proof necessary for a finding of liability is wholly lacking. Galloway v. United States, 319 U. S. 372, 388-396 (1943).

Gallick v. *Baltimore & O. R. R.*, 372 U. S. 108, 117 (1963); *Inman* v. *Baltimore & O. R. R., supra.* Unless foreseeability is established, the court cannot even reach the question whether the precautions taken to guard against the harm were reasonable. *Lillie* v. *Thompson*, 332 U. S. 459 (1957).

John Hartel's death was caused by persons not employed by or under the control of respondent. It was instead the result of the criminal acts of strangers. Inasmuch as "under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the presumption that others will obey the criminal law. . . ." *W. Prosser, Torts* 175-76 (3d ed. 1964), it was petitioner's burden to show that, notwithstanding such a presumption, respondent had reason to foresee a criminal attack upon her husband at the Mineola station. She did not carry that burden. She proffered no evidence that an attack was likely, probable or foreseeable. There was no evidence either offered or admitted to show (1) any prior holdups or criminal attacks at the Mineola station; (2) any complaints by anyone concerning the safety of railroad employees at the Mineola station; (3) any warnings that the crime might occur; or (4) any other circumstances, such as the presence of dangerous persons, that would put respondent on notice that the Mineola station might be the target of a criminal attack. Accordingly, the trial court correctly concluded:

> "Plaintiff has introduced no evidence showing that defendant should have reasonably foreseen the possibility of a holdup at the Mineola Station." (Pet. App. 14a.)

2. Petitioner argues that having made foreseeability the "pivot on which liability turns," the courts below strictly excluded evidence tending to establish a basis for foresee-

ability." (Pet. 4-5.) That argument was similarly made to and rejected by the Second Circuit.

No evidence relating to the foreseeability of a criminal attack at the Mineola station was excluded. None was offered. Instead, petitioner attempted to show that during the four years prior to the incident in question, several crimes had been committed in other passenger stations, some almost 30 miles away. No foundation was laid for the admission of such evidence; there was no showing that the prior crimes occurred under conditions in any way similar to those at the Mineola station in 1968. Thus, the evidence offered was probative of nothing.

Unless there is a substantial similarity in time, place and nature between the prior crimes and the one in question, evidence of prior crimes is inadmissible and insufficient to put the railroad on notice of a danger to be foreseen at the situs of the incident. Such evidence is not relevant and could be highly prejudicial. *Sue* v. *Chicago Transit Authority*, 279 F. 2d 416 (1960); *Plough* v. *Baltimore & O. R. R.*, 164 F. 2d 254 (2d Cir. 1947), *cert. denied*, 333 U. S. 861 (1948).* Throughout the trials and appeals of this action, petitioner has never cited a single case in which evidence of prior crimes or accidents not occurring at the situs of the incident in question has been admitted to show foreseeability. Accordingly, the Second Circuit's decision that the trial

*Gallick v. Baltimore & O. R. R., 372 U. S. 108 (1962), cited by petitioner, supports respondent's position. There an employee was bitten by an insect in the vicinity of a stagnant, vermin-infested pool. The railroad had notice of that dangerous condition. Although the jury found in a special interrogatory that the railroad was negligent, it also found that the railroad had no reason to anticipate that injury might result from the dangerous condition. The inconsistency was resolved in the employee's favor, and the Court criticized an instruction from which the jury might have determined that since no mishaps had occurred at the pool in the past, there was no reason to anticipate injury to the petitioner. In the case at bar, on the other hand, there was no pre-existing "dangerous condition" of which respondent had notice. It is as if in *Gallick* there had been an insect bite but no stagnant pool.

court properly rejected the evidence proffered by petitioner was entirely correct.

Moreover, the trial court correctly rejected unrelated correspondence (Pl. Ex. 12, 13; R. 177, 178) and testimony (R. 85-114) as to conversations between union officials and respondent relating to requests for increased protection for ticket clerks. It was established at trial that none of the testimony and correspondence related to the Mineola station, hence it could not establish notice to respondent that the Mineola station was an unsafe place to work.

Finally, the trial court properly excluded rank hearsay concerning a conversation between petitioner and a general attorney for respondent.* Mrs. Hartel offered to testify that at her husband's funeral, the attorney, who had been a friend of Mr. Hartel's, told her that her husband had once mentioned to him that "he was afraid of working at the Mineola station". (R. 120-21.)** The attorney was not called as a witness, no showing was made that he was unavailable, nor were the applicable portions of his deposition read. Moreover, no showing was made that he was authorized by the railroad to receive notice of dangerous conditions or that Mr. Hartel had intended to give the railroad such notice. *See Schilling* v. *Delaware & H. R. R.,* 114 F. 2d 69 (2d Cir. 1940).

Even if the trial court erred by excluding certain evidence, however, that does not entitle petitioner to a new trial. Since none of the excluded evidence tended to show that respondent had notice of the likelihood of a criminal attack at Mineola, it would not have been sufficient to establish foreseeability. In all events, there is no evidence that respondent was negligent or that its negligence in any way

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*Petitioner incorrectly refers to that attorney as a member of respondent's claims department. (Pet. 5; *but see* R. 127.)

**The petition incorrectly states, without citation, that the testimony concerned "the unsafe condition at the Mineola station." (Pet. 5.) There is no such evidence in the record.

contributed to Mr. Hartel's death. Petitioner's suggestion on appeal that a peephole or a different type shutter could have been installed is gratuitous; since there was no evidence of how Mr. Hartel was killed, it would have been grossly improper to permit a jury to speculate that the lack of such devices contributed in any way to his death. As the Second Circuit concluded:

> "Although absent foreseeability, plaintiff's case was deficient as a matter of law, the Trial Court also said: '[O]n judicial appraisal, I find that negligence on the part of defendant railroad could have played no part in the death of plaintiff's intestate'. We agree. Even if the LIRR had installed, as plaintiff now suggests, either a steel shutter opening from the inside or a peep-hole which might have enabled the agent to observe persons in the waiting room, these measures would not have protected him from assault and murder." (Pet. App. 9a.)

3. This case presents no special or important reasons for further consideration by this Court. All of petitioner's contentions have been fully and fairly heard by the courts below. There is no conflict among the circuits, nor has the court below decided an important question which has not been, but should be, settled by this Court.* Accordingly, further review is unwarranted.

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*Mr. Justice Frankfurter, dissenting in Ferguson v. Moore-McCormack Lines, 352 U. S. 521, 546 (1957) observed:

> "For the Supreme Court of the United States to spend two hours of solemn argument, plus countless other hours reading the briefs and record and writing opinions, to determine whether there was evidence to support an allegation [of negligence] . . ., is surely to misconceive the discretion that was entrusted to the wisdom of the Court for the control of its calendar. The Court may or may not be 'doing justice' in the four insignificant cases it decides today; it certainly is doing injustice to the significant and important cases on the calendar and to its own role as the supreme judicial body of the country."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

June 21, 1973

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

DOCKET NO. 72-1578

AUDREY S. HARTEL, individually and as Administratrix of the Estate of JOHN HARTEL, Deceased,

Petitioner,

—against—

THE LONG ISLAND RAIL ROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

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June 28, 1973

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REPLY BRIEF FOR PETITIONER

The Brief for the Respondent in opposition to the Petition makes it necessary that Petitioner refer to matters in the Record not originally considered essential. It was the effort of Petitioner to demonstrate most succinctly that there was sufficient evidence tendered by Petitioner to require jury determination as to whether or not the holdup was foreseeable by Respondent under all the circumstances.

Accordingly, the only evidence discussed thus far was culled from the opinions in the Courts below. This preoccupation with brevity may have de-emphasized the substance and persuasiveness of Petitioner's tenders to the issue of foreseeability.

Exhibit 3 (R. 155, 156) visualizes through a camera's eye the isolation of the Mineola Station from contacts with the surrounding community, particularly on an early Sunday

morning, making it a logical candidate for a holdup in the metropolitan area of New York.

Plaintiff's Exhibit 11, which was also erroneously and prejudicially excluded by the Trial Judge, is a confession by one of the perpetrators of the holdup. In pertinent part that confession states (R. 171):

> "Woodie [another perpetrator] said he had this job planned for two months, he knew what time the man got to the train station. He said that there might be two men but one comes early and one comes later. Woodie said the first man gets in about twenty minutes to seven in the morning. He said we would have to get there about six o'clock. Woodie said there would be about two grand for each one of us."

If admitted then, this evidence would tend to show at least that this was not a spontaneous holdup and, relevantly to the foreseeability issue, that the danger to decedent came about because predators were able to identify in advance that the Mineola Station was an appropriate target for a holdup.

It is obviously arguable that if criminals could calculate that the Mineola Station was vulnerable to a holdup, a reasonably prudent railroad might also have foreseen that possibility and might reasonably have made the inexpensive changes suggested by the decedent's union representative to reduce the hazard to ticket agents at least at that particular place, even though the request for changes was general.

The confession excluded by the Trial Court was admitted into evidence at the murder trial of the confessor, but Judge Levet excluded the confession from this civil trial, citing *Donnelly* v. *United States,* 228 U.S. 243. Petitioner, by

deposition, had previously established the refusal of the confessor to answer any questions in this case without counsel to advise him of his rights, and the confession should have been admissible (Rule 43, Federal Rules of Civil Procedure, and *People* v. *Brown*, 26 N.Y.2d 88).

It is true that Hartel's death was caused in part by the criminal acts of strangers. Respondent leans heavily on an historic presumption that third parties will behave lawfully (Respondent's Brief, p. 4). Contemporary history in the metropolitan area of New York suggests that this presumption is unfortunately becoming a slim reed. In the vicinity of this accident the presumption among all prudent people is that property must be guarded and protected against theft. It is the genius of the common law that it can adapt to human experience. Presumptions that are archaic in fact should become at least weakened for judicial purposes.

It is specious for Respondent to argue that no evidence relating to the foreseeability of a criminal attack at the Mineola Station was excluded and that none was offered. The Respondent had admitted to 10 holdups of its own ticket offices, 9 of which occurred within 2 years preceding the Hartel tragedy (Exhibit 13 for Identification, pp. 179-183). Although 4 of these holdups had occurred at comparable stations to Mineola within a radius of 7 miles of the Mineola Station, the Trial Court excluded from the record each and every incident. This evidence would have tended to show that holdups of Long Island ticket agents in the area were on the increase to the knowledge of the defendant. The relevancy of this truth should be beyond dispute and should be admissible without any other foundation. The defendant's knowledge of these holdups, rather than the details, was germane.

It is hornbook learning (Devitt and Blackmar §89.05) that the amount of care exercised by a reasonably prudent

person varies in proportion to the danger known to be involved. It is singularly appropriate for a jury to be privy to the knowledge of danger available to the defendant in order to estimate whether or not the defendant responded prudently.

In case after case this Court has hammered out the proposition that in F.E.L.A. cases questions of causation between negligence and damage are for the jury. *Lavender* v. *Kurn*, 327 U.S. 645 (1946); *Tennant* v. *Peoria P.U.R. Co.*, 321 U.S. 29, 64 S.Ct. 409 (1944); *Ellis* v. *Union Pacific R.R.*, 329 U.S. 649 (1947); *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957).

It is disappointing then to find that the prevailing opinion in the Second Circuit suggests that even if the steel shutter danger was eliminated "or the peephole was put in which might have enabled the agent to observe persons in the waiting room, these measures would not have protected him from assault and murder."

This is a judicial trespass in precisely that area preserved for juries in F.E.L.A. cases according to the teachings of this Court.

It should also be clear, contrary to the Brief in Opposition and the opinion of the Court of Appeals, that the suggestions for eliminating the danger from opening the steel shutter from the waiting room, and for a peephole were not appellate afterthoughts by the Petitioner. These were suggestions conveyed to the defendant before the holdup and the death of John Hartel, the Ticket Agent "for all ticket offices, including Mineola" (R. 86, 92, 93, 95).

As suggested in the original Petition, this case does represent the deprivation of the right to a jury trial, albeit in a sophisticated manner with the trappings of pseudo-authority. It accomplishes that deprivation by the introduction of an unprecedented rationale for F.E.L.A. cases, to wit: the narrow concept of specific advance notice as a condition precedent to liability. This rationale may be appropriate in sidewalk slip and fall cases against municipalities, where the public policy is to insulate the municipality, or excusable in dog-bite cases where the stakes are generally low. It would be most regressive to permit the introduction of the requirement of specific notice to shield employers from the liability imposed by social legislation with the humanitarian objectives of the Federal Employers' Liability Act.

A writ should be granted.

Respectfully submitted,

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June 28, 1973